4 ICMA BASE REUSE HANDBOOK
Environmental Cleanup

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4.5 Environmental Baseline Surveys

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Regardless of whether the Air Force, Navy, or Army currently exercises jurisdiction over the property being considered for transfer, one of the first steps in the required environmental program leading to property disposal is the commencement of an Environmental Baseline Survey, or EBS. The general purpose of an EBS is to gather and examine information in order to document the "nature, magnitude, and extent" of any environmental contamination on the military property. The importance of the EBS process has been heightened since President Bill Clinton signed the Fiscal Year 1997 Defense Authorization Act that amended Superfund to make it easier to transfer base property, *even* if it is contaminated.

This section describes the typical EBS process undertaken by the military department. It also examines ways in which a Local Redevelopment Authority (LRA) can participate in the EBS process both to help ensure the success of the reuse plan and to minimize potential local-government liability for future environmental cleanup.

The Scope of the EBS: Basewide versus Site-Specific Surveys

Depending on the circumstances at a particular installation, the military department may conduct a "basewide" EBS, a "site-specific" EBS, or both.

Basewide EBS

As the name suggests, a basewide EBS evaluates the environmental conditions of all property at the installation. *Thus, the basewide EBS seeks to determine the potential for present and past contamination, that is, whether hazardous substances were released or disposed of.*

While it may not reach final conclusions about the future use of each parcel, a basewide EBS is necessary to identify portions of the base that are "clean," or uncontaminated, within the meaning of section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), or "Superfund."

To provide some flexibility to communities seeking to speed the transfer of property from the military, Congress recently amended CERCLA to expand the definition uncontaminated property. Previously, section 120(h)(4) deemed property to be "clean" only if it contained no hazardous substances and if "no petroleum products or their derivatives were stored for one year or more, [or were] known to have been released, or disposed of."(1) Now, the mere *storage* of petroleum products or their derivatives does not require classifying the land as contaminated *unless* it is known that the substance was leaked, spilled, or otherwise released on the property.(2) As a result, parcels that previously had been classified as contaminated can now be categorized as clean (with the concurrence of federal or state environmental regulators), thus permitting conveyance without an approved cleanup plan in place. *A*

basewide EBS is nonetheless still important because it provides critical information about the environmental history of the property needed to determine whether, under the new definition, it is clean or contaminated.

Site-Specific EBS

A site-specific EBS includes a more detailed evaluation of a particular parcel, usually in response to issues raised during a basewide EBS. It may be necessary, for instance, to obtain additional information to better quantify the extent of suspected or known contamination. Comprehensive on-site analysis, including soil or groundwater sampling, may be necessary.(3)

The site-specific EBS typically serves as the underlying analysis for a FOSL or FOST determination. Pursuant to U.S. Department of Defense (DoD) policy, no property can be conveyed by deed or leased (even on an interim basis) until the military department with jurisdiction makes a Finding of Suitability to Transfer (FOST) or a Finding of Suitability to Lease (FOSL). The Secretary of Defense first established the FOSL and FOST processes as part of DoD's 1993 Fast Track Cleanup Plan for Closing Installations, an overall program created in response to President Clinton's 1993 Five Part Plan to speed transfer of closed military facilities to local governments. *The military department will make a FOSL or FOST finding only after completing and reviewing an EBS covering the property in question.*

The FOST process remains largely intact even in light of the well-publicized "transfer-by-deed" amendment to CERCLA. In addition to adopting an expanded definition of clean property (described above), in fall 1996 Congress further loosened CERCLA's reins on conveyances of federal property by adopting the "transfer by deed" amendment to section 120(h)(3). Specifically, the FY 1997 Defense Authorization Act amended Superfund to permit a military department to convey real property without the usual certified cleanup plan *if* the Governor and the U.S. Environmental Protection Agency (only needed for National Priorities List [NPL] sites) determines that (1) the "property is suitable for transfer for the use intended by the transferee, and the intended use is consistent with the protection of human health and the environment;" (2) the deed contains certain statutorily required assurances designed to protect human health and the environment; (3) there has been adequate notice of the transfer and an opportunity for public comment on the suitability of the transfer; or (4) the transfer will not delay any necessary cleanup.(4)

Clearly, the amendment contemplates that military departments, with concurrence from EPA or state environmental regulators, will continue to subject the property in question to the FOST process, including a site-specific EBS. In fact, a complete and detailed EBS is now more important than ever since—given the expedited transfer—the LRA is likely to rely much more heavily on that analysis to evaluate the extent and nature of the contamination.

Overall Purposes of the EBS

The EBS serves as the beginning or core analysis for a number of findings. Among other things, the EBS:

- documents the environmental condition of base property, including the nature, type and extent of any contamination;
- provides a basis for notice to the transferee of the release or disposal of a hazardous substance to ensure compliance with section 120(h)(1) of CERCLA;
- provides information to assess the health and safety risks posed by environmental contamination, including the potential for future releases;
- provides a basis for the military department to identify uncontaminated parcels that may be transferred upon compliance with all other requirements, including concurrence by EPA or state environmental regulators, as applicable; and

- provides a basis for the military department's FOSL or FOST determination, which is required before any property – whether contaminated or clean – can be transferred.

Why the EBS Is Important to the LRA

The LRA sponsoring the reuse plan should make every effort to become an active participant in the EBS process as early as possible. As a defining environmental document, the EBS in many ways sets the parameters for the transfer of military property. The LRA's early participation in the EBS process makes it much more likely that the EBS will be comprehensive, appropriately detailed, and thorough.

First, the EBS provides the data needed to identify parcels of land that are uncontaminated.

These parcels may be available for use before environmental cleanup of other areas of the base is completed. This information can be critical to an LRA's redevelopment strategy and plan. For instance, the LRA may be able to develop a short-term marketing strategy focusing on those parcels that are not tainted by environmental contamination.

Second, by identifying environmental contamination or potential areas of concern, the EBS provides valuable information for use in the property valuation and appraisal process.

Although the military departments have become more realistic about the true value of the military properties being considered for disposal, the EBS can provide further "hard" evidence of the extent of needed cleanup—information that the LRA can use in negotiations over the specific terms of the transfer.

Third, and most important, by assessing the risks that contamination poses to the health and safety of the community and adequate protection of the environment, the EBS can provide information the LRA needs to evaluate the potential for future releases of hazardous substances.

Changing environmental conditions or new development activity often can result in additional or new releases of contamination. This potential is of particular concern to the LRA because it or its constituent local governments could be left holding the financial "bag" for cleaning up new releases.

Section 120(h)(3) of CERCLA requires the United States to include a covenant in the transfer deed which commits the federal government to clean up any contamination discovered on the property subsequent to the disposal.(5) Despite this assurance, it is increasingly clear that DoD does not view this commitment as open-ended. Statements made by the military departments portend the willingness of the federal government to address these issues when they arise years after the property is transferred.

For instance, DoD released a draft policy in September 1996 stating that the department would perform additional cleanup at a former base if human health or the environment were threatened "due either to failure of the selected remedy or to subsequent discovery of additional contaminants *attributable to DoD activities*."(6) Stated differently, if the environmental threat is arguably the result of activities authorized by the LRA or a constituent local government subsequent to the land transfer, that is, earth extraction, or moving or hauling related to development, then DoD will *not take* responsibility for cleanup. Moreover, where additional cleanup is needed only to facilitate a land use that is prohibited by an original land-use control in place at the time of transfer, DoD will not assist in meeting the new standard. Finally, DoD has taken the position that it has no obligation to indemnify transferees as required by section 330 (of the FY 1993 Defense Authorization Act) if the claims arose from a use of property prohibited by a deed restriction.

Another example is the DoD policy on asbestos removal. DoD has determined that its obligation to

clean up property being transferred does not extend to removing asbestos from decades-old barracks and military buildings, because the asbestos is "encapsulated" in the buildings, that is, not exposed to the air and not "friable," thus posing no immediate health risk to the community. DoD takes this position even if the LRA plans to demolish the buildings. DoD's Policy on Asbestos notes that *"remediation...will not be required when the buildings are scheduled for demolition by the transferee [i.e., the LRA]...The transferee assumes responsibility for the management of any ACM [asbestos-containing material] in accordance with applicable laws."*(7) The assumption of "responsibility" referred to includes the assumption of financial responsibility for asbestos removal--a complicated undertaking frequently costing millions of dollars.

In light of increasing budget concerns, one would expect to see additional efforts by DoD and its constituent military departments (or by DoD's attorneys in litigation – the U.S. Department of Justice) to avoid financial responsibility for post-transfer cleanup. Accordingly, *it is vital for the LRA to press the military to evaluate the potential for DoD-originated contaminants to be released subsequent to the property transfer.* To the extent possible, this evaluation should consider specific reuse concepts contemplated by the LRA. Given the technical nature of these determinations, it also may be prudent for the LRA to enlist the assistance of a specialized environmental consultant.

The military department may seek to limit the federal government's liability by insisting that the conveyance documents impose specific use restrictions, or "institutional controls," on future activities on the property. If not anticipated by the LRA, certain use restrictions could drastically affect the reuse plan and the marketability of the property. Thus, the earlier in the process these potential limitations are known, the greater the opportunity DoD and the LRA will have for developing comprehensive and creative approaches to resolving existing and future environmental threats.

Getting Involved

Given the importance of the EBS process to the LRA, the LRA or local government representative should seek "a seat at the table" in the EBS process as early as possible. Although regulatory agencies will be notified shortly after the EBS process is initiated, *the LRA should designate a representative to contact the base personnel overseeing the EBS* to begin to develop a relationship and to ensure that the LRA can actively participate in the process. This interaction is critical to ensure proper foresight and coordination of the development of the base reuse plan, and to protect the long-term interests of the community.

If the EBS process is already underway by the time the LRA is formed, the BEC or other members of the BRAC Cleanup Team (BCT) may be willing to conduct "mentoring" sessions to help bring new local government participants up to speed later in the process.

How an EBS Is Done: Review and Evaluation Procedures(8)

Every EBS includes at minimum a two-part review: (1) a comprehensive records search and (2) an on-site physical inspection to identify and evaluate any environmental threats or concerns. The EBS also may include soil and water sampling, if existing sampling data is inadequate.

Documentation Collection and Assessment

During the initial stages of the EBS process, the military department will focus on identifying documentation that has already been generated as the result of ongoing environmental compliance or from prior remedial investigations or surveys. A great deal of information can be gleaned from existing records management systems established as the result of past and ongoing environmental compliance programs. Pursuant to the Defense Environmental Restoration Program, the military departments have been required to implement cleanup programs for active bases.(9) As a result, each base generally

already has implemented an Installation Restoration Program (IRP), designed to identify, investigate and clean up contamination from hazardous substances, pollutants, and contaminants that pose an "imminent and substantial endangerment to the public health or welfare or to the environment."(10)

Existing reports from the IRP or other studies may contain much information on the presence, amount, and condition of asbestos, lead (in paint and drinking water), polychlorinated biphenyls (PCBs), and improperly disposed-of pesticides, oils, paints, solvents and lubricants; the presence, number, and condition of underground (or aboveground) storage tanks and piping systems; the release or threatened release of hazardous substances (including unexploded ordnance); and the presence of medical, biohazardous, or radioactive waste. Searches and reviews of federal, state, and local regulatory reports, notices of violation or noncompliance, corrective action agreements, compliance orders, air quality or emission credit permits, water quality permits, and related records are undertaken as well.

The military department or selected EBS contractor is also likely to research and examine all relevant real property records, including chain-of-title documents, to ascertain premilitary uses of the property in question. Finally, reviews of aerial photographs and interviews with current and/or former employees of the installation may be undertaken.

At times, these underlying reports, if attainable, can reveal much about a particular parcel and may be of great interest to the LRA's representative or environmental consultant.

Comprehensive On-Site Investigation

The military department or EBS contractor also conducts a comprehensive on-site examination or walk-through of the facility. This aspect of the EBS can be one of the most beneficial to the LRA or its representative because it gives the transferee the opportunity to see the facility firsthand. If possible, the LRA representative should ask to participate in the walk-through inspection, preferably with its own environmental specialist or consultant. Faint odors, stained soil, "stressed" vegetation, or other subtle indications of potential contamination provide invaluable information to experts, and can help identify potential concerns early in the process, thus giving the parties as much time as possible to determine the full extent of contamination.

Sampling

In some cases, in addition to reviewing existing data and conducting a physical inspection of the closing base, it also may be necessary for the military department to collect soil and water samples from particular sites on the base. This sampling program typically will take place after the preparation of a draft version of the EBS, which categorizes the parcels of property within the base to the extent possible given existing information and then identifies particular parcels for which additional data collection is needed. After the completion of the sampling program, the basewide EBS could be revised, or the military department could simply prepare a site-specific EBS for the area covered by the sampling.

Conclusion

The EBS provides a foundation for several critical determinations — most notably, which parcels of property, if any, are uncontaminated under CERCLA and whether a particular parcel meets the requirements needed to support a FOSL or a FOST. In addition, the EBS provides information that the LRA will need to negotiate effectively with the applicable military department on the true value of the property being transferred, the likely cleanup cost, and any use restrictions on that property. Becoming involved in the EBS process as early as possible thus gives the LRA a unique opportunity to identify and resolve environmental issues that it typically would not learn about until after many critical

determinations had been made. Indeed, in a process where so much has already been decided for the community affected by a base closure, the LRA should not pass up the chance to have some influence over the community's future.

(1) 42 U.S.C. § 9620(h)(4) (1995).
(2) U.S.C. § 9620(h)(4) (amended by the Fiscal Year 1997 Defense Authorization Act).
(3) Department of Defense, *Fast-Track Cleanup for Closing Installations*, "DoD Policy on the Implementation of the Community Environmental Response Facilitation Act," at 2-4 (May18, 1996).
(4) National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2422 (Sept. 3, 1996).
(5) 42 U.S.C. § 9620(h)(3)(B).
(6) U.S. Department of Defense, *Draft Policy Re: Responsibility for Environmental Cleanup Due to Changes in Land Use after Transfer* (Sept. 1996).
(7) U.S. Department of Defense, *Policy on Asbestos at Base Realignment and Closure Properties (printed in DoD Base Reuse Implementation Manual*, at F-67 [July 1995]).
(8) See appendix L for a flowchart of the EBS process, reprinted from Navel Facilities Engineering Command, U.S. Department of the Navy, *Environmental Baseline Survey Guidance* (March 1995).
(9) 10 U.S.C. §§2701-2708.
(10) Id § 2701 (b)(2).

[Section 4.1] [Section 4.2] [Section 4.3] [Section 4.4] [Section 4.5] [Section 4.6]

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